

Case - Supreme Court, U. S.

FILED

JUL 2 1947

CHARLES ELSONE DOWLEY
CLERK

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946

No. 1445

109

CATHERINE M. O'NEILL, as Administratrix,
Petitioner,
against

CUNARD WHITE STAR, LTD.,
Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.

GEORGE DEFOREST LORD,
Counsel for Respondent.

✓ JAMES S. HEMINGWAY,
WILLIAM J. BRENNAN,
Of Counsel.

INDEX

	PAGE
Statement -----	1
The Questions Involved -----	1
The Facts -----	2
Point 1—No substantial question of law is presented	3
Conclusion—The application for a writ of certiorari should be denied -----	6

TABLE OF CASES

American Law Institute Restatement of Conflict of Laws, § 406 -----	5
Frese v. Chicago, Burlington & Quincy R. R. Co., 263 U. S. 1, 4 -----	3
Gambera v. Bergoty, 132 Fed. (2d) 414 (C. C. A. 2d)---	4
Kyriakos v. Goulandris, 151 Fed. (2d) 132 (C. C. A. 2d) -----	4
Mellon, Director General v. Goodyear, 277 U. S. 335, 344 -----	3
Michigan Central R. R. v. Vreeland, 227 U. S. 59, 70---	3
Scotland, The, 105 U. S. 24, 29-----	5
Urvic v. Jarka Co., 282 U. S. 234 -----	4

1-1-1

IN THE
Supreme Court of the United States

OCTOBER TERM, 1946

No. 1445

CATHERINE M. O'NEILL, as Administratrix,
Petitioner,
against

CUNARD WHITE STAR, LTD.,
Respondent.

**BRIEF FOR RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SECOND CIRCUIT.**

Statement

The petitioner, as Administratrix of an alien resident foreign seaman, serving upon a foreign ship, who signed shipping articles in a foreign port and who lost his life on shipboard during the course of a voyage while the ship was on the high seas between England and Canada, asks this Court to declare that the unanimous Circuit Court of Appeals was in error in failing to grant Jones Act remedies to the claim of the petitioner. The opinion of the Circuit Court of Appeals affirming the order of the lower court is officially reported at 160 F. (2d) 446.

The Questions Involved

The petitioner's statement purporting to set forth the "questions presented" to be found on pages 4 and 5 of the

petition herein contains various matters of a purely argumentative and speculative nature and entirely fails to set forth the real questions presented to this Court. In simple terms the questions may be stated as follows:

First: "In a suit brought in admiralty by a personal representative of a deceased seaman to recover for wrongful death, is the right of said personal representative to recover conditioned upon the existence in the deceased seaman at the time of his death of a right to recover for his injury?"

Second: "Does the Jones Act apply in a suit in admiralty brought by the administratrix of a resident alien seaman against an alien corporation for wrongful death of the plaintiff's intestate occurring on the high seas during a voyage between foreign ports in one of which the deceased seaman signed shipping articles?"

The Facts

The facts are undisputed and are fully set forth in the opinion of the Circuit Court of Appeals (R. 51-52) reading as follows:

"The plaintiff appeals from an order of the District Court, refusing to transfer her action from the law to the admiralty side of the court, to be prosecuted as a libel *in personam*. The plaintiff, a British subject, filed a complaint as administratrix of Richard O'Neill, her husband (also a British subject) against the Cunard Line, a British corporation having a place of business in the Borough of Manhattan. She sued to recover damages resulting from the intestate's death, while serving as an able seaman upon a ship belonging to the defendant. O'Neill had 'signed on' in London for a voyage to Canada and return; and he was washed overboard on the high seas as the result, the plaintiff alleged, of the unseaworthiness of the ship and of the negligence of the defendant's servants. He had come to this country in 1924, had declared his intention of becoming a citizen in 1925, and had resided here ever since, but had never been naturalized. The plaintiff

came here at some time before March, 1932, at which time she declared her intention of becoming a citizen, but she also had never been naturalized. The couple had four children, all born in this country, all of whom resided with their parents in Brooklyn. The defendant moved to dismiss the complaint for lack of substantive jurisdiction on the ground that both plaintiff and defendant were aliens, and the court granted the motion, giving leave, however, to the plaintiff to reframe her complaint, which she did, changing it to a libel *in personam* in the admiralty, based upon the Jones Act and upon 'the Federal Statute, which governs actions for wrongful death.' Again the court dismissed it, without prejudice, however, to transferring it to the admiralty side of the court. The plaintiff, this time as a libellant, then moved so to transfer it; but this the court denied, and it is from that order that the plaintiff has appealed." (R. 51-52.)

POINT I

No substantial question of law is presented.

This Court has consistently held that the right to recover for wrongful death is dependent upon the right of the deceased person to recover had he survived.

Michigan Central R. R. v. Vreeland, 227 U. S. 59, 70;

Frese v. Chicago, Burlington & Quincy R. R. Co., 263 U. S. 1, 4;

Mellon, Director General v. Goodyear, 277 U. S. 335, 344.

The case of *Van Beek, Administrator v. Sabine Towing Co.*, 300 U. S. 342, relied upon by the petitioner, is not at variance with the principle enunciated in the foregoing cases. The *Van Beek* case was decided by this Court following the adoption of an amendment in 1910 of the

Employers Liability Act (April 5, 1910, C. 143, Sec. 2, 36 Stat. 291; 45 U. S. C. 59). This Court held that by virtue of this amendment an administrator is permitted to continue any cause of action "belonging to the decedent" as at the time of his death. The amendment was designed to permit recovery for damages sustained by the decedent himself between the date of his injury and his death. In the *Van Beek* case it is apparent that the decedent himself, had he survived, could recover for his injuries under the Jones Act (46 U. S. C. 688) because he was an American seaman on an American ship. There was, therefore, in existence a cause of action "belonging to the decedent" which the administrator was permitted to continue. In the instant case, however, the Circuit Court has found that there was no cause of action under the Jones Act "belonging to the decedent", hence no cause of action under that act for the administratrix to continue.

Neither from the language of the *Van Beek* case nor the statutes, as urged by the petitioner, can it be inferred that beneficiaries of a decedent are entitled to a recovery independent of any right the decedent himself may have had, if he survived.

In the appellate cases where Jones Act remedies have been applied against alien defendants or respondents in favor of alien plaintiffs or libellants, the injuries sued for have occurred within United States Territorial waters and the vessel upon which the injury occurred was bound upon a voyage beginning and ending in the United States.

Gambera v. Bergoty, 132 F. (2d) 414 (C. C. A. 2d);

Kyriakos v. Goulandris, 151 F. (2d) 132 (C. C. A. 2d);

Urvic v. Jarka Co., 282 U. S. 234.

In the instant case, however, as the Circuit Court pointed out in its opinion (R. 54), the wrongful death occurring as it did to an alien British subject on the high seas between

two foreign ports, the articles having been signed in a foreign port, and the vessel at no time inbound to or outbound from a United States port, there was no justification for a United States Court of Admiralty to apply any law other than the law of England. Should the wrongful death be construed as a tort, this court has held in *The Scotland*, 105 U. S. 24, that the British law will be applicable. Mr. Justice BRADLEY, writing the opinion for this Court, said at page 29:

“But if the contesting vessels belonged to the same foreign nation, the court would assume that they were subject to the law of their nation carried under their common flag and would determine the controversy accordingly.”

See also American Law Institute Restatement of Conflict of Laws, Paragraph 406, reading as follows:

“*Tort on High Seas.* Liability for an alleged tort committed on board a vessel while the vessel is on the high seas outside the territorial waters of any state is determined by the law of the state whose flag the vessel flies.”

If the wrongful death were construed to be a breach of contract, the liability for the breach must, of course, be determined either under the law of the place where the contract was made, which was in England, or the law of the place where the performance allegedly failed, which was on a British vessel on the high seas. In either case, the law of England would be applicable to the exclusion of the United States statutes.

It is to be remembered that in the instant case it is conceded that the petitioner's intestate was an alien at the time of his death (R. 44) and any reference in the opinion of the Circuit Court to the rights of American seamen serving on British vessels should be considered as dicta and unnecessary to the decision in this case.

CONCLUSION

**The application for a writ of certiorari
should be denied.**

Respectfully submitted,

GEORGE DEFOREST LORD,
Counsel for Respondent.

JAMES S. HEMINGWAY,
WILLIAM J. BRENNAN,
Of Counsel.